Local Cable Overbuilding Issues:

The Search for a Level Playing Field

Presented by:

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I. THE BASIC RULES

A rather substantial body of "level playing field" cases has emerged in recent years. These cases case appear to uniformly hold that:

(1) Franchises must be compared, not on an item-by-item basis, but as entire packages;

(2) "Equal" benefits and "equal" burdens are not required; rather, the appropriate standard is "substantial" similarity;

(3) When comparing the terms and the build-out requirements of franchises, the appropriate comparison is not between the new entrant's franchise and an incumbent's renewal franchise, but between the new entrant's franchise and the original franchise that the incumbent (or its predecessor) obtained at the time that its situation more closely resembled that of the new entrant today;

(4) If the incumbent or its predecessor failed to meet construction deadlines set forth in the original franchise, the court should base its comparison on the incumbent's (or its predecessor's) actual experience;

(5) It is inappropriate to compare a new entrant's burden in constructing an entirely new system with an incumbent's burden in upgrading an existing system; and

(6) A franchising authority may properly give weight to both the added risks that a new entrant faces in attempting to enter a market against entrenched competition and the benefits of incumbency that an existing provider enjoys.

Remember - It is a competitive cable TV franchise, not Noah's Ark.

You don't need two of everything to ensure survival.

II. THE RELEVANT CASES

In ***United Cable Television Services Corp. v. Dep't of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995),** an incumbent cable operator alleged that the franchising authority[1] had unlawfully awarded a cable franchise to a new entrant without properly considering its financial responsibility, ability to perform efficiently and fourteen other factors. The incumbent further alleged that the franchising authority had also violated Connecticut's "level playing field" law[2] by approving the new franchise on terms and conditions that were more favorable than the counterpart terms and conditions in the incumbent's franchise.

As an initial matter, the court found that incumbent lacked standing to challenge the general fitness of the new entrant. The court determined that the incumbent was not "aggrieved" as a matter of law by having to meet new competition, was not within the zone of interests protected by Connecticut's cable franchising requirements, and was not a proper representative to uphold the public-interest provisions of the Connecticut franchising law. *Id*., 663 A.2d at 1018-19. Rather, the court concluded, the incumbent had standing "only to raise claims regarding the terms of competition pursuant to [Connecticut's level playing field law]." *Id*., 663 A.2d at 1019.

The *United Cable* court made no specific rulings under the level playing field law, but it laid down standards that several other courts later embraced. Among other things, the *United Cable* court observed that it would frustrate the goal of providing consumers the benefits of competition "if existing cable providers voluntarily could take on additional

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1 Although Connecticut franchises cable operators at the state level through the Department of Public Utility Control (DPUC), the principles enunciated in *United Cable* and other Connecticut cases apply as well to community-based franchising authorities.

2 Connecticut General Statutes § 16-331(g) provides: "Each certificate of public convenience and necessity for a franchise issued pursuant to this section shall be nonexclusive, and each such certificate issued for a franchise in any area of the state where an existing franchise is currently operating shall not contain more favorable terms or conditions than those imposed on the existing franchise. This subsection shall not apply to the length of the term of such certification as may be determined pursuant to subsection (d) of this section."

burdens in order to reap a future benefit and then have potential competitors bound by those new terms viewed in isolation without reference to the terms of the original certificate." *Id*., 663 A.2d at 1025. The court also noted that "[a] proper inquiry requires consideration of the entire package of terms and conditions required of both cable providers in order adequately to determine whether one has been favored over the other." *Id*. at 1025.

In ***Cable Systems of Southern Connecticut, Ltd. v. Connecticut DPUC*, 1996 WL 661818,** the court applied the rationale of *United Cable* in response to – among other things – the following issue raised by the incumbent: "whether there is a comparison between Fibervision's new system construction and Cablevision's system rebuild." *Id*., at *3. The court found that "[t]he comparison between Fibervision's task in creating a new system and Cablevision's rebuild plan is conceded by Cablevision to be of different projects. ... It also represents a different task, which is facilitated by Cablevision's substantial existing customer base." *Id*., at *4.

In ***Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC*, 1996 WL 6611805**, the incumbent Comcast complained that Fibervision's franchise had a 12-year build-out requirement, as compared with Comcast's 6-year requirement, and that the DPUC had improperly considered Comcast's benefits of incumbency. The court compared Fibervision's build-out schedule with the original build-out schedule in the franchise of *Comcast's predecessor* and found that Fibervision's annual completion percentage would "certainly [be] comparable to *Plaintiff's initial progress*." *Id*. at *3 (emphasis added). The court also found that Fibervision planned to complete its entire system of 737 miles within 12 years, whereas Comcast and its predecessors actually took 15 years to build only 525 miles. *Id*. Accordingly, with respect to buildout, the court concluded,

> To the extent that it is meaningful for the court to engage in an item-by-item comparison, such endeavor fails to show unfair competition with respect to the build-out schedule imposed on Fibervision *compared with the history of Comcast and its predecessors*.
>
> This is especially the case where Fibervision is creating a "state-of-the-art" system compared with what was installed in the 1970's. Comcast also refers to its obligation to rebuild its system in three years.

> *The analogy between initial installation of a system and the rebuild of an existing system with a substantial customer base, is not compelling.*

Id. at *3 **-** *4 (emphasis added). Turning to the incumbency issue, the court found:

> Plaintiff's argument that the advantage of incumbency opinion is not supported in the record ignores undisputed evidence in the record. The record reveals that Comcast has been the monopoly cable television provider in the franchise area, with 68,000 customers and "is a subsidiary of one of the largest cable providers in the United States. Its marketing power is massive, especially in light of its interlocking ties with programming suppliers."

Id. at *4.

In ***New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276 (1998)**, various incumbent operators challenged the DPUC's award of a statewide cable franchise to Personal Vision. The Supreme Court of Connecticut upheld the franchise and took the occasion to reaffirm and extend the principles that it had enunciated in *United Cable.* Among other things, the Court reiterated that incumbent cable operators have no standing to challenge decisions by the franchising authority on issues other than level-playing-field issues, because "incumbent franchisees are not representatives of the public" and "fall outside the zone of interest to be protected by [Connecticut's franchising laws]," *id*., 717 A.2d at 1283. A franchising authority "must consider the entire package of terms and conditions applicable to the incumbent franchisee compared with those of the new competitor" and must recognize that it is "the totality of the terms that controls the determination of whether one certificate is more favorable than another." *Id*. at 1287. "Where one term may be construed as more favorable, another term that is less favorable may fill the gap to leave the terms and conditions of the certificate, on balance, no more favorable than that of the existing franchisee." *Id*.

Specifically, with respect to buildout obligations, the court compared apples-to-apples – i.e., the new entrant's original construction schedule with the *original* construction schedules and actual performance of the incumbents and their predecessors. *Id*., 717 A.2d at 1291. The court echoed the district court's finding that "there are certain benefits that inherently inure to the plaintiffs' status as incumbents that serve to offset the inherent advantages applicable to a statewide franchise." *Id*., 717 A.2d at 1292 n.27. The court also found that it was appropriate for the franchising authority to find that "if Personal Vision does reap some benefit from increased economies of scale" as a result of operating statewide, "the advantage is no more than an appropriate return for the increased financial risk that Personal Vision will bear in engaging in this project." *Id*., 717 A.2d at 1292-92. The court concluded:

> The department's sole duty pursuant to [the Connecticut level playing field law] is to ensure that the specific terms of a competitor's certificate are not, on balance, more favorable than those of the incumbents. The department is obligated to tailor the terms and conditions so as best to serve the public interest, while striving to prevent institutional advantages for new competitors. It is not permitted, however, to stifle competition, which is in the best interest of the public, for the protection of incumbent providers who are not yet ready to meet the challenge of competition because they have not taken advantage of the present regulatory scheme.

Id., 717 A.2d at 1293.

In ***Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 209692 (ND. Ill)**, the court found,

> The Illinois Overbuild Act states " ... no such additional ... franchise shall be granted under terms or conditions more favorable or less burdensome to the applicant than those required under the existing cable television franchise...." 65 ILCS § 5/11- 42-11(e). Nothing in the above language supports the conclusion that new and existing franchises must contain identical terms. Courts interpreting similar statutes in other states have reached the same conclusion. [Citations to Connecticut cases omitted.]
>
> Rather than requiring identical terms for new and existing franchises, this Court interprets the Illinois Overbuild Act to require terms and conditions under a new franchise that, when considered as a whole, are no more favorable or less burdensome than the total package of the terms and conditions under the existing franchise. See *United Cable*, 1994 WL 495402 at *5 (concluding that the Connecticut "Level Playing Field" Act requires a "comparison of the entire package of terms and conditions imposed on the existing and the new franchisee to determine whether, as a whole, the terms and conditions are more favorable."). This Court agrees with the *United Cable* court's observation that

> if [the new franchisee] were required to achieve point-by-point equality in terms and conditions, the [franchise authority] would be put in the position of imposing particular requirements on a new entrant not because of any particular need but simply to match the situation that existed at the time of the application of the existing entrant, without regard to new information, new technology or other temporal developments. 1994 WL 495402 at *5.

Naperville, at *12.

In ***In re: Dakota Telecommunications Group*, 590 N.W.2d 644 (Minn. App. 1999)**, the incumbent cable operator, Bresnan Communications, challenged the City of Marshall, Minnesota's award of a second cable franchise to Dakota Telecommunications Group (DTG). Bresnan alleged that the City's action was arbitrary and capricious because the City had failed to give adequate consideration to DTG's financial ability. Bresnan also alleged that the City had violated Bresnan's due process rights by refusing to conduct a public hearing at which Bresnan could examine DTG's employees and the City's staff and consultants with regard to DTG's financial ability.

The court held that Bresnan lacked standing to challenge DTG's general fitness for a franchise, citing *New England Cable Television Ass'n, United Cable* and *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411 (8th Cir. 1976).[3] *Dakota*, 590 N.W.2d at 648. The court also rejected Bresnan's contention that it had standing under the federal Cable Act. The court reasoned,

> The Cable Act intends to promote competition within the cable communications market. *See* Minn.Stat. § 238.01 (noting statute created to "encourage areawide service * * * and discourage concentration of control and ownership"); *see also* 47 U.S.C. § 541(a)(1) (forbidding state franchising authorities from granting exclusive franchises or unreasonably refusing to award additional, competitive franchises). *Although the Cable Act also intends to further the public's interest by only awarding franchises to responsible cable operators, it does not support an incumbent franchise's attempt to secure a monopoly by challenging the fitness of new, competing*

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[3] The court characterized *Churchill* as holding that "common carriers, whose sole motivation in case was economic self-interest, did not establish standing to contest commission's grant of permit under National Environmental Policy Act." *Dakota*, 590 N.W.2d at 648. *See* Attachment 13.

> *franchises*. *See* Minn. Stat. § 238.01 (encouraging rapid development of cable industry that is responsive to public's interest); *see also* 47 U.S.C. § 521(2) (noting purpose of Federal Cable Act is to assure cable industry is developing in response to local community's needs); *see Tennessee Elec. Power Co. v. Tennessee Valley Auth.,* 306 U.S. 118, 139, 59 S.Ct. 366, 370, 83 L.Ed. 543 (1939) (stating franchise "exist[s] as a corporation, and * * * in the absence of a specific charter contract * * * creates no right to be free of competition"); *cf. Twin Ports,* 257 N.W.2d at 346 (concluding relator, whose business lost money once agency issued competitor's license, had standing to contest agency's decision in light of statute restricting number of ambulance services for quality-assurance purposes).

Dakota, 590 N.W.2d at 648 (emphasis added).

Next, the court assumed that Bresnan had standing and rejected on the merits Bresnan's attack on the City's assessment of DTG's financial ability. The court noted that neither federal or state law prescribes exactly how a City should weigh evidence about an applicant's financial ability, and it satisfied itself that the City had indeed focused on DTG's ability to construct and initially operate its system. Then, applying standard principles of municipal corporation law, the court deferred to the City's judgment on DTG's financial ability. *Dakota*, 590 N.W.2d at 648.

Turning to Bresnan's due process arguments, the court found that the City did not abuse its discretion in denying Bresnan a hearing because Bresnan, as the holder of a non-exclusive franchise, did not have a property right in freedom from competition. *Dakota*, 590 N.W.2d at 648. The court also found that the City had adequately considered Bresnan's franchise rights during its negotiations with DTG. *Id*.

Case summaries and analysis provided by Jim Baller, The Baller Herbst Law Group, 2014 P Street, NW, Washington, DC 20036, (202) 833-1144 (phone), (202) 833-1180 (fax) from the City of Louisville's Memorandum In Support Of Motion For Summary Judgment in *Insight Communications Co., LP. v. City of Louisville, KY, NO.00-CI-07100 (Jefferson Co. Cir. Ct).*